IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIAN GREENE *et al.*,	)	CASE NO. 2:10-cv-00038
	)	
Plaintiffs,	)	Judge: Edmund A. Sargus, Jr.
	)	
v.	)	Magistrate Judge: Terence P. Kemp
	)	
AB COASTER HOLDINGS, INC.	)	
	)	**PLAINTIFFS' MOTION FOR**
Defendant.	)	**LEAVE TO FILE A SECOND**
	)	**AMENDED COMPLAINT**

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and Local Rule 7.1, Plaintiffs Brian Greene, Penny Greene, and Professional Billing Consultants, Inc. (collectively "the Greenes") respectfully request that this Court grant leave to file a Second Amended Complaint, a copy of which is attached hereto. The purpose of filing the Second Amended Complaint is to clarify certain portions of the complaint in view of discovery that has been conducted in this matter, and to amend the claim for false marking to add a claim for damages under the revised 35 U.S.C. § 292(b) in addition to the existing claim under the 35 U.S.C. § 292 effective as of the filing date of this action.

This motion and amended complaint are timely filed in accordance with the Court's amended scheduling order (Dkt. 68). Pursuant to Local Rule 7.3, counsel for the Greenes attempted to contact the trial attorney for Ab Coaster Holdings but was unable to reach Mr. Alexander prior to filing this motion. The undersigned counsel will promptly notify the court if consent is received from Ab Coaster Holdings' counsel.

The grounds for this motion are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,

/s/Arland T. Stein

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MEMORANDUM IN SUPPORT

The Greenes should be granted leave to file this Second Amended Complaint. Leave to file an amended complaint shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2); *Chase v. Matsu Mfg., Inc.*, 147 Fed. Appx. 507, 514 (6th Cir. 2005). The critical factors for the Court to consider on a motion under Rule 15 are notice and substantial prejudice. *Id.* (citing *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980)). In interpreting Rule 15, the Supreme Court has instructed that:

> In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - the leave sought should, as the rules required, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

The present amendment is appropriate to conform the complaint to information uncovered during discovery, including the allegation that Ab Coaster Holdings did not own legal title to the '367 patent at the time of the alleged infringement as demonstrated by the *nunc pro tunc* assignment attached as new Exhibit 12 to the Second Amended Complaint, and submitted with this motion.

The present amendment also amends the false marking allegation in view of the recently adopted America Invents Act. By this amendment, the Greenes have added a claim of competitive injury and seek damages adequate to compensate for that injury in accordance with revised Section 292(b). To be clear, the Greenes also maintain their original claim seeking the statutory penalty of $500 per offense under the original Section 292 effective as of the date this action was filed.

Finally, an amendment of the Greenes' Complaint will not cause delay or undue prejudice toward Ab Coaster Holdings. As noted, after nearly two years Ab Coaster Holdings still has not yet answered the Greenes original complaint. Therefore, "justice so requires" that the Greenes be allowed to file its Second Amended Complaint.

CONCLUSION

For the foregoing reasons, the Greenes respectfully request that this Court grant leave to file an Amended Complaint. A proposed Order is attached hereto for the Court's convenience.

Respectfully submitted,

/s/Arland T. Stein

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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